

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

BRUCE LOWELL WILLIAMS, II,	)	
	)	No. CV-10-5021-CI
Plaintiff,	)	
	)	REPORT AND RECOMMENDATION TO
v.	)	GRANT DEFENDANT'S MOTION FOR
	)	SUMMARY JUDGMENT AND DISMISS
SERGEANT R. MORGAN,	)	ALL CLAIMS WITH PREJUDICE
	)	
Defendant.	)	

Before the court on Report and Recommendation is Defendant's Motion for Summary Judgment (Ct. Rec. 21.) Plaintiff, a prisoner currently incarcerated at the Washington State Penitentiary, is proceeding *pro se* and *in forma pauperis*. (Ct. Rec. 5.) Defendant is represented by Assistant Attorney General Carl P. Warring. The parties have not consented to proceed before a magistrate judge.

**PROCEDURAL HISTORY**

On February 25, 2010, Plaintiff filed a Complaint against Defendant and several other Washington State Department of Corrections officials, alleging violations of his civil rights pursuant to 42 U.S.C. § 1983. (Ct. Rec. 1.) On, April 9, 2010, the court dismissed the Complaint in part and directed service on remaining Defendant, Sergeant R. Morgan. (Ct. Rec. 7, 8.) Consistent with the court's scheduling order (Ct. Rec. 18), Defendant timely filed the instant Motion for Summary Judgment. (Ct. Rec. 21.) The Scheduling Order, entered on July 13, 2010, contained a Notice to Plaintiff, advising him of his rights and obligations under court rules governing motions for summary

1 judgment. (Ct. Rec. 18 at 4.) In addition, a separate "Notice to  
2 Pro Se Litigants of the Dismissal and/or Summary Judgment Rule  
3 Requirements" was sent by the Court Clerk to Plaintiff at his  
4 address of record at the Walla Walla State Penitentiary (WWSP) on  
5 February 18, 2011. (Ct. Rec. 26.)

#### 6 COMPLAINT

7 Liberally construed, Plaintiff's Complaint alleges insufficient  
8 protection and deliberate indifference to his safety in violation of  
9 his Eighth and Fourteenth Amendment rights. (Ct. Rec. 1, 6, 7.)  
10 Specifically, he claims he was seriously harmed by another inmate,  
11 after he expressed to prison officials his concerns for his well-  
12 being and living conditions to prison officials. He alleges  
13 Defendant "denied all courtesy." (Ct. Rec. 6 at 3-4.) He requests  
14 monetary damages in the amount of \$250,000. (*Id.*)

#### 15 SUMMARY JUDGMENT

16 FED. RULE CIV. P. 56(c) states a party is entitled to summary  
17 judgment in its favor, "if the pleadings, depositions, answers to  
18 interrogatories, and admissions on file, together with the  
19 affidavits, if any, show that there is no genuine issue as to any  
20 material fact and that the moving party is entitled to judgment as  
21 a matter of law." See also *Celotex Corp. v. Catrett*, 477 U.S. 317  
22 (1986). Once the moving party has carried the burden under Rule 56,  
23 the party opposing the motion must present facts in evidentiary form  
24 and cannot merely rest on the pleadings. *Anderson v. Anderson*.  
25 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Genuine issues are  
26 not raised by mere conclusory or speculative allegations. *Lujan v.*  
27 *National Wildlife Federation*, 497 U.S. 871, 888 (1990). The court  
28 will examine the direct and circumstantial proof offered by the non-

1 moving party and the permissible inferences which may be drawn from  
2 such evidence. A party cannot defeat a summary judgment motion by  
3 drawing strength from the weakness of the other party's argument or  
4 by showing "that it will discredit the moving party's evidence at  
5 trial and proceed in the hope that something can be developed at  
6 trial in the way of evidence to support its claim." *T.W. Elec.*  
7 *Service, Inc. v. Pacific Elec. Contractors Ass'n.*, 809 F.2d 626, 630  
8 (9th Cir. 1987); see also, *Triton Energy Corp. v. Square D Co.*, 68  
9 F.3d 1216 (9th Cir. 1995).

10 Although the court holds a *pro se* prisoner complaint to "less  
11 stringent standards than formal pleadings drafted by lawyers,"  
12 *Haines v. Kerner*, 404 U.S. 519, 520 (1972), and will not dismiss a  
13 complaint due simply to inartful pleadings, a party opposing summary  
14 judgment must present "significant probative evidence tending to  
15 support the complaint" to defeat summary judgment. *Anderson*, 477  
16 U.S. at 248-49. Plaintiff is not entitled to rely on mere  
17 allegations in his verified Complaint in opposing Defendant's Motion  
18 for Summary Judgment. See, e.g., *Lew v. Kona Hosp.*, 754 F.2d 1420,  
19 1423-24 (9<sup>th</sup> Cir. 1985).

20 Finally, the Supreme Court has ruled that RULE 56(c) requires  
21 entry of summary judgment "against a party who fails to make a  
22 showing sufficient to establish the existence of an element  
23 essential to that party's case, and on which that party will bear  
24 the burden of proof at trial." *Celotex*, 477 U.S. at 322. "A  
25 complete failure of proof concerning an essential element of the  
26 nonmoving party's case necessarily renders all other facts  
27 immaterial." *Id.* at 323. The question on summary judgment, then,  
28 is "whether the evidence is so one-sided that one party must prevail

1 as a matter of law." *Anderson*, 477 U. S. at 251-52. Where there is  
2 no evidence on which a jury could reasonably find for the non-moving  
3 party, summary judgment is appropriate. *Id.* at 252.

#### 4 42 U.S.C. § 1983

5 To state a claim under 42 U.S.C. § 1983, Plaintiff must allege  
6 (1) the violation of a right secured by the Constitution and laws of  
7 the United States, and (2) the deprivation was committed by a person  
8 acting under color of state law. *Parratt v. Taylor*, 451 U.S. 527,  
9 535 (1981), *overruled in part on other grounds, Daniels v. Williams*,  
10 474 U.S. 327, 330-31 (1986); *Leer v. Murphy*, 844 F.2d 628, 632-33  
11 (9<sup>th</sup> Cir. 1988). A person subjects another to a deprivation of a  
12 constitutional right when committing an affirmative act,  
13 participating in another's affirmative act, or omitting to perform  
14 an act which is legally required. *Johnson v. Duffy*, 588 F.2d 740,  
15 743 (9th Cir. 1978). To hold a defendant liable for damages, the  
16 wrongdoer must personally cause the violation. *Leer*, 844 F.2d at  
17 633. If damages are sought, sweeping conclusory allegations against  
18 a prison official will not suffice; an inmate must set forth  
19 specific facts as to each individual defendant's participation.  
20 *Leer*, 844 F.2d at 634. Here, there is no issue to whether Defendant  
21 was acting under color of state law; the only question is whether  
22 Defendant's acts were unconstitutional.

23 Defendant argues there is no evidence of constitutional  
24 deprivation and all claims should be dismissed. (Ct. Rec. 23.) In  
25 support of his Motion, he filed a Statement of Facts (SOF), which is  
26 supported by a properly verified Declaration. (Ct. Rec. 24, 25.)

#### 27 UNCONTROVERTED FACTS

28 Plaintiff has not objected to, or controverted by responsive

1 memorandum, the Defendant's Statement of Facts.<sup>1</sup> Therefore, those  
2 facts are admitted to exist without controversy. LR 56.1(b) (d).

3 The uncontroverted material facts are summarized as follows:

4 1. Defendant is a Corrections and Custody officer at the  
5 Washington State Penitentiary.

6 2. Defendant discussed Plaintiff's request for a cell  
7 transfer in October 2009, informing Plaintiff that the request would  
8 have to be taken to "the cell move committee."

9 3. Defendant asked Plaintiff if he was concerned for his  
10 safety due to problems getting along with his cell mate.

11 4. Plaintiff indicated he was not concerned for his safety  
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13 <sup>1</sup> Despite receiving notice pursuant to *Rand v. Rowland*, 154 F.3d  
14 952 (9<sup>th</sup> Cir. 1998), *cert. denied*, 527 U.S. 1035 (1999), Plaintiff has  
15 not responded to the Defendant's Motion for Summary Judgment. LR 7.1,  
16 Local Rules for the Eastern District of Washington, states that  
17 failure to respond to a motion may be considered consent by the non-  
18 moving party to entry of an adverse order. LR 7.1(h)(5). However,  
19 the court may consider assertions in a plaintiff's complaint as  
20 evidence in opposition of a motion for summary judgment if (1) the  
21 facts asserted are based on personal knowledge, (2) they are  
22 admissible in evidence, and (3) the plaintiff has declared under  
23 penalty of perjury that the contents of the complaint are true and  
24 correct. *Schroeder v. McDonald*, 55 F.3d 454, 460 (9<sup>th</sup> Cir. 1995);  
25 *McElyea v. Babbitt*, 833 F.2d 196, 197 (9<sup>th</sup> Cir. 1987). Here,  
26 Plaintiff's Complaint is properly verified. (Ct. Rec. 1, 6.) In  
27 addressing the Motion for Summary Judgment, the court has considered  
28 Plaintiff's assertions.

1 and would request the cell move committee for a transfer.

2 5. Plaintiff could have asked for administrative segregation  
3 if he believed his safety was threatened.

4 6. On October 31, 2009, Plaintiff was involved in a fight  
5 with his cell mate.

6 7. Prison officials found a two-liter bottle of jailhouse  
7 intoxicant ("pruno") in Plaintiff's cell following the fight.

8 8. Plaintiff was cited and plead guilty to possession of the  
9 intoxicant.

10 (Ct. Rec. 24, 25.)

11 **INSUFFICIENT PROTECTION/ DELIBERATE INDIFFERENCE**

12 Insufficient protection of a prisoner resulting in harm  
13 inflicted by other inmates may violate a prisoner's constitutional  
14 rights. *See White v. Roper*, 901 F.2d 1501, 1503-04 (9<sup>th</sup> Cir. 1990).  
15 When a prisoner is claiming he has not been afforded adequate  
16 protection against violent acts by other inmates, the prisoner must  
17 show the prison officials' acts were deliberately indifferent to the  
18 prisoner's vulnerability. *Wilson v. Seiter*, 501 U.S. 294 (1991);  
19 *Redman v. County of San Diego*, 942 F.2d 1435, 1443 (9<sup>th</sup> Cir. 1991)  
20 (*en banc*), *cert. denied*, 502 U.S. 1074 (1992).

21 A prisoner may establish a § 1983 claim under the Eighth and  
22 Fourteenth Amendments against prison officials when the officials  
23 acted with deliberate indifference to the threat of serious harm or  
24 injury by another prisoner. *Leer v. Murphy*, 844 F.2d 628, 633 (9<sup>th</sup>  
25 Cir. 1988); *Berg v. Kincheloe*, 794 F.2d 457, 460 (9<sup>th</sup> Cir. 1986).  
26 Under the deliberate indifference standard, a plaintiff must  
27 demonstrate the prison officials knew he faced a substantial risk of  
28 serious harm and they disregarded that risk by failing to take

1 reasonable measures to abate it. *Farmer v. Brennan*, 511 U.S. 825,  
2 847 (1994).

3 Here, there are no facts in evidence that Defendant acted with  
4 deliberate indifference to Plaintiff's safety. Plaintiff does not  
5 dispute the fact he failed to inform Defendant he feared for his  
6 safety or faced a "substantial risk of harm" from his cell mate.  
7 Plaintiff offers no probative evidence to support his allegations of  
8 serious injury and insufficient protection from a known threat.  
9 *White*, 901 F.2d at 1503. The evidence does not support a "reliable  
10 inference of wantonness" on the part of the Defendant necessary to  
11 raise an issue of material fact. *Farmer*, 511 U.S. at 847. Because  
12 Plaintiff has failed to establish the existence of an essential  
13 element to his claim of deliberate indifference, Defendant should be  
14 granted summary judgment as a matter of law. *Celotex*, 477 U.S. at  
15 322.

#### 16 CONCLUSION

17 Viewing the evidence in the light most favorable to Plaintiff,  
18 Plaintiff's claim does not rise to the level of constitutional  
19 deprivation. The evidence presents no issue of material fact, and  
20 there is no evidence before the court on which a jury could  
21 reasonably find for Plaintiff. Accordingly, **IT IS RECOMMENDED**  
22 Defendant's Motion for Summary Judgment (**Ct. Rec. 21**) be **GRANTED** and  
23 Plaintiff's Complaint (**Ct. Rec. 1, 6**) be **dismissed with prejudice**.

#### 24 OBJECTIONS

25 Any party may object to a magistrate judge's proposed findings,  
26 recommendations or report within **fourteen (14)** days following  
27 service with a copy thereof. Such party shall file written  
28 objections with the Clerk of the Court and serve objections on all

1 parties, specifically identifying the portions to which objection is  
2 being made, and the basis therefor. Any response to the objection  
3 shall be filed within **fourteen (14)** days after receipt of the  
4 objection. Attention is directed to FED. R. CIV. P. 6(d), which adds  
5 additional time after certain kinds of service.

6 A district judge will make a de novo determination of those  
7 portions to which objection is made and may accept, reject, or  
8 modify the magistrate judge's determination. The judge need not  
9 conduct a new hearing or hear arguments and may consider the  
10 magistrate judge's record and make an independent determination  
11 thereon. The judge may, but is not required to, accept or consider  
12 additional evidence, or may recommit the matter to the magistrate  
13 judge with instructions. *United States v. Howell*, 231 F.3d 615, 621  
14 (9th Cir. 2000); 28 U.S.C. § 636(b)(1)(B) and (C), FED. R. CIV. P.  
15 72(b)(3); LMR 4, Local Rules for the Eastern District of Washington.

16 A magistrate judge's recommendation cannot be appealed to a  
17 court of appeals; only the district judge's order or judgment can be  
18 appealed.

19 The District Court Executive is directed to file this Report  
20 and Recommendation and provide copies to Petitioner, counsel for  
21 Defendant, and the referring district judge.

22 DATED March 25, 2011.

23  
24 S/ CYNTHIA IMBROGNO  
25 UNITED STATES MAGISTRATE JUDGE  
26  
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